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No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF TEXAS, *et al.*,

Petitioners,

—v.—

WALTER CAMENISCH,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., *AMICUS CURIAE,* IN SUPPORT OF RESPONDENT

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MOTION OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Legal Action Center of the City of New York, Inc., respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the within brief amicus curiae. Although the attorney for the respondent Walter Camenisch has consented to the filing of a brief amicus curiae,* counsel for petitioners has refused consent.

* Consent of counsel for respondent is being lodged with the Clerk of the Court.

The Legal Action Center is a public interest law firm founded in 1973. A large portion of its program is dedicated to fair employment issues, particularly those related to the employment of former substance abusers, a group protected by section 504 of the Rehabilitation Act. The Legal Action Center has engaged in litigation and administrative proceedings arising under the Rehabilitation Act and is therefore familiar with the issues raised in the instant case and with the effect a reversal of the decision below would have upon the protections afforded by the Act to handicapped individuals. Those protections are in the process of being defined and developed in the lower courts. The Legal Action Center has limited its brief as amicus curiae to the two issues presented to this Court which would affect a handicapped individual's right to sue because, in its judgment, reversal of the decision below on either of these grounds would severely hamper fair employment efforts on behalf of all handicapped groups. Moreover, the Center believes that this case can be resolved on a narrower ground than that presented by the parties to this Court, namely that the factual record in this case is inadequate to decide an important question of law.

To assist the Court's resolution of a case which could affect the ways in which handicapped individuals

can enforce the important protections afforded them under the Rehabilitation Act, we submit this brief amicus curiae.

Respectfully submitted,

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Dated: January 28, 1981

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BRIEF OF THE LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., AMICUS CURIAE, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae appears in the foregoing motion.

STATEMENT OF THE CASE

Respondent Walter Camenisch, a deaf graduate student at the University of Texas at Austin (petitioners), is a "qualified handicapped individual" as

that term is defined in section 504 of the Rehabilitation Act of 1973 and regulations issued by the Department of Health, Education and Welfare (now the Department of Health and Human Services) (Stipulation of Facts, ¶ ¶ 1, 7, 8, Petitioners' Appendix at A-30). Respondent Camenisch's continued employment as Dean of Students at the East Campus of the Texas School for the Deaf was contingent upon his completion of a Master's Degree. While respondent Camenisch was otherwise qualified to complete a Master's Degree at the University of Texas at Austin, in order to participate in and complete that program he needed the services of a sign language interpreter (Stipulation of Facts ¶9, Petitioners' Appendix at A-31).

The University of Texas at Austin received a substantial portion of its budget from the federal government at the time respondent was enrolled in its graduate program (Stipulation of Facts ¶ ¶ 17, 18, Exhibit 5. Petitioners' Appendix at A-32, A-41-43). Petitioners signed an Assurance of Compliance agreement with HEW which bound the University to "comply with section 504 of the Rehabilitation Act, . . . all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto . . . in consideration of and for the purpose of obtaining any and all federal grants, . . . or other federal financial assistance" (Stipulation of Facts ¶17, Exhibit 5, Petitioners' Appendix at A-32, A-41-43).

Regulations promulgated by HEW require recipients of federal financial assistance, such as petitioners, to provide otherwise qualified handicapped individuals, such as respondent, with the services of a sign language interpreter (45 C.F.R. Part 84). Despite this, and despite a finding by HEW that their refusal to do so was a violation of section 504, petitioners refused to provide respondent Camenisch with the services he needed in order to complete their Master's program.

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act of 1973 confers a private right of action upon "otherwise qualified handicapped individuals" who by reason of their handicap are "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination under any program or activity receiving Federal financial assistance." Congress patterned the language of section 504 on the language of Title VI of the Civil Rights Act of 1964, which it knew had been held to create a private right of action. Congress reaffirmed its original intent to create a private remedy for victims of discrimination prohibited by section 504 in amending the Rehabilitation Act in 1974 and 1978 (Point I.A).

A private right of action is consistent with the underlying purposes of section 504. Private remedies

under section 504 complement the administrative enforcement mechanisms established by executive agencies, since those mechanisms do not provide for individual participation in administrative proceedings or for individual relief from discrimination (Point I.B). Finally, implying a federal remedy is clearly appropriate in this civil rights area, as the Justice Department (the agency charged with government-wide coordination of section 504 enforcement) and seven courts of appeals have found (Point I.C).

This Court should reject petitioners' belated attempt to raise the question whether the relief granted was appropriate in this case in the absence of a finding that the federal funds the University of Texas at Austin received were directly related to the "program or activity" in which respondent sought to participate.

First, it is clear from the legislative history surrounding passage of the Rehabilitation Act, and from regulations promulgated by the relevant executive agencies, that petitioners' restricted reading of the term "program or activity" is in error (Point II.A). Second, because petitioners never raised the issue below, the record developed in this case is insufficient for this Court to determine whether a narrow reading of the term "program or activity" under section 504 is in order (Point II.B).

ARGUMENT

I

AS CONGRESS INTENDED AND THE COURT OF APPEALS CORRECTLY HELD, SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE RIGHT OF ACTION ON QUALIFIED HANDICAPPED INDIVIDUALS WHO ARE VICTIMS OF DISCRIMINATION.

Section 504 of the Rehabilitation Act of 1973[1/] mandates that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. §794.

As in the case of other civil rights statutes enacted in the decade preceding Congress' enactment of this civil rights law,[2/] section 504 of the Rehabilitation Act does not explicitly confer a private right of action

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1/ Pub. L. 93-112 (September 26, 1973), 87 Stat. 357, codified in 29 U.S.C. §701 et seq.

2/ E.g., Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d ("Title VI"); section 901 of Title IX of the Education Amendments of 1972, 29 U.S.C. §1681 ("Title IX").

on individuals injured by discriminatory practices in violation of it. But this Court "has long recognized that under certain limited circumstances the failure of Congress to [expressly specify a private right of action in a statute] is not inconsistent with an intent on its part to have such a remedy available to persons benefited by its legislation." Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 1967-8 (1979). Like Title IX of the Education Amendments of 1972, which was found by the Court in Cannon to have created a private remedy, section 504 of the Rehabilitation Act "presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied [private] remedy are present." Id., 99 S.Ct. at 1968.

The factors to be considered in determining whether the circumstances favoring implication of a private remedy are present in this case were originally outlined by this Court in Cort v. Ash:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action

> one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

422 U.S. 66, 78 (1975) (citations omitted). Cannon and subsequent decisions of this Court emphasize that the "central inquiry" in cases such as the one at bar is "whether Congress intended to create, either expressly or by implication, a private cause of action," Touche Ross & Co. v. Redington, ___ U.S. ___, 99 S.Ct. 2479, 2489 (1979); Transamerica Mortgage Advisors, Inc. v. Lewis, ___ U.S. ___, 100 S.Ct. 242 (1979). And they make it clear that the "first three factors discussed in Cort — the language and focus of the statute, its legislative history, and its purpose . . . are ones traditionally relied upon in determining legislative intent," id.

A. The First and Second Cort v. Ash Factors: Congress Clearly Intended to Create a Private Right of Action for "Qualified Handicapped Individuals."

The plain language of section 504, the legislative history of the Rehabilitation Act as originally enacted, and as amended by Congress in 1974 and 1978, and the clearly remedial and protective purposes of its nondiscrimination mandate all manifest an intent on the part of Congress to create a private right of action.

The threshold question under Cort is whether section 504 was enacted for the benefit of a special class of which plaintiff is a member. That question "is answered by looking to the language of the statute itself," Cannon v. University of Chicago, supra, 99 S.Ct. at 1953.

Section 504 unquestionably identifies the particular class of persons — qualified handicapped individuals — for whose especial benefit the statute was enacted. It does so in language typical of civil rights statutes which declare the rights of discrete groups of individuals to be free from invidious discrimination. Cf. Cannon, 99 S.Ct. at 1954 n. 13. Its language is virtually identical to the nondiscrimination mandates contained in Title IX of the Education Amendments of 1972[3/] and Title VI of the Civil Rights Act of 1964[4/] — language which this Court

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3/ Section 901 of Title IX of the Education Amendments of 1972, 29 U.S.C. §1681, provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

4/ Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, provides:

(footnote continued next page)

found dispositive in determining that a private right of action exists under Title IX, Cannon, 99 S.Ct. at 1953-55. Indeed, as discussed infra at 10, the nondiscrimination mandate of section 504 was consciously patterned after those two civil rights laws. In Cannon, this Court gave particular weight to the fact that Congress, when it patterned Title IX after the nondiscrimination provision of Title VI, knew that Title VI had consistently been construed as creating a private remedy. Id., 99 S.Ct. at 1956-58. Since section 504 is patterned after both Title VI and Title IX, what was said in Cannon applies with equal force here:

> it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents [implying private rights of action under Title VI and similarly phrased statutes]. . . and that it expected its enactment to be interpreted in conformity with them.

Id., 99 S.Ct. at 1958.

It is not, however, necessary to rely upon a presumption that Congress knew what it was doing when it patterned section 504 after the language in Title VI and

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> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX. For the legislative history of the 1974 and 1978 amendments to the Rehabilitation Act makes explicit this reliance on prior court rulings, and clarifies beyond dispute that Congress' original intent was that section 504 provide a private remedy for persons injured by its violation.

The comments of the Senate Labor and Public Welfare Committee on the 1974 amendments to the Rehabilitation Act[5/] are illustrative:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1972. . . .
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts. . . . This approach to implementation of section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

S. Rep. No. 93-1297, 93rd Cong., 2d Sess., reprinted in

5/ The Rehabilitation Act Amendments of 1974, Pub. L. 93-516 (December 7, 1974), 88 Stat. 1619, expanded the definition of "handicapped individual" for purposes of Titles IV and V (including section 504) of the Act, see 29 U.S.C. §706(7), and made other clarifying changes.

[1974] U.S. Code Cong. & Ad. News, 6371, 6390-91 (emphasis added).

Any possible remaining question on the issue is laid to rest by the 1978 amendments which added section 505 to the Act.[6/] Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. §794a(a)(2). Since Title VI remedies have been consistently construed by courts and were understood by Congress to include a private right of action, Cannon, 99 S.Ct. at 1957; see also Regents of the University of California v. Bakke, 438 U.S. 265 (1978), this statutory language makes explicit Congress' intent to create a private right of action.

Moreover, the 1978 amendments also added a provision parallel to the Civil Rights Attorney's Fees

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6/ The Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, §120, Pub. L. 95-602 (Nov. 6, 1978), 92 Stat. 2982.

Awards Act of 1976, 42 U.S.C. §1988.[7/] Section 505(b) provides that:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. §794a(b). This provision clearly presumes the existence and availability of a private right of action to enforce section 504. Cf. Cannon, 99 S.Ct. at 1951 n.6, 1952 n.7. The legislative history underlying this attorneys' fee provision supports this reading. The Senate report on section 505(b) states:

> The committee believes that the rights extended to handicapped individuals under Title V, that is, Federal government employment, physical accessibility in public buildings, employment under federal contracts, and nondiscrimination under federal grants — are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance and the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504.

7/ Petitioners' argument that the failure of the Civil Rights Attorney's Fees Awards Act to mention section 504 suggests that Congress intended no private right of action under that statute obviously loses all force in light of Congress' subsequent enactment of section 505(b) of the Rehabilitation Act.

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978) (emphasis supplied).[8/]

[8/] The floor debates on this provision are also illuminating. Thus Senator Cranston, who authored the attorneys' fee provision, noted that:

> Priavte [sic] enforcement of these Title V [including section 504] rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. As noted in the report to accompany S. 2278, the Civil Rights Attorneys' Fee Awards Act of 1976 (S. Rept. 94-1011):
>
> > [A]ll . . . civil rights law[s] depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate Congressional policies which these laws combat.

124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978). See also 124 Cong. Rec. S18999-19000 (daily ed. Oct. 14, 1978) (remarks of Sen. Stafford); 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (Senators Bayh and Cranston expressing "the continuing intention of Congress that private actions be allowed under titles VI and VII of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972 and title V of the Rehabilitation Act of 1973").

In sum, the language and legislative history of section 504 and related provisions of the Rehabilitation Act demonstrate beyond cavil an original and progressively more explicit Congressional intent that victims of discrimination forbidden by section 504 be given both the right and, through the attorneys' fee provision, a meaningful opportunity to vindicate privately the purposes of section 504.[9/]

9/ The fact that Congress provided the best illumination of its intent respecting the existence of a private right of action under section 504, not at the time of its original enactment, but in the legislative history of the 1974 and 1978 amendments to the Rehabilitation Act, in no way lessens the clarity of that intent. It is well established that the post-amendment treatment of a statute by Congress is cogent evidence of the intent of Congress at the time of its passage, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). This Court made clear in Cannon that, although post-enactment interpretations by Congress of its original intent in enacting the civil rights statute at issue there could not be accorded the weight of contemporary legislative history,

> we would be remiss if we ignored those authoritative expressions concerning the scope and purpose of Title IX and its place within "the civil rights enforcement scheme" that successive Congresses have created over the past 110 years.

Cannon, supra, 99 S.Ct. at 1952 n.7.

B. The Third Cort v. Ash Factor: A Private Right Of Action is Consistent With the Underlying Purposes of Section 504.

For precisely the reasons that led this Court in Cannon to find a private remedy to be compatible with the underlying legislative scheme of Title IX, the answer to the third Cort inquiry in this case is clear: far from frustrating them, a private remedy will affirmatively aid the accomplishment of Congress' dual purposes in enacting section 504.

As with Title IX, the language and legislative history of section 504 reveal that Congress sought to accomplish two purposes through its enactment: to avoid the use of federal resources to support the discriminatory practices forbidden by section 504, and to provide individuals an effective remedy against those practices. As with Title IX, the first purpose is well served by the administrative enforcement procedures established under section 504 for termination of federal financial assistance to entities engaged in discriminatory practices outlawed by section 504. But the administrative enforcement mechanism under section 504 is identical to that used to enforce Title IX; [10/] it suffers from the

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10/ The regulations HEW adopted to implement section 504 incorporate the Title VI enforcement procedures, see 45 C.F.R. §84.61 (1979) (HEW regulations

(footnote continued next page)

same deficiencies that led this Court to find a private remedy complementary to and not destructive of the administrative enforcement mechanism under that statute.

As this Court noted in Cannon, 99 S.Ct. at 1961-62, the remedy of terminating federal financial assistance — the only sanction available under the administrative enforcement scheme — is a draconian and at the same time ineffective means of remedying individual instances

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implementing section 504 among recipients of HEW funds) and 45 C.F.R. §85.5 (1979) (HEW regulations implementing Executive Order 11914); those are the same administrative procedures used to enforce Title IX, 45 C.F.R. §86.71 (1979). Executive Order 11914, 41 Fed. Reg. 17871 (April 28, 1976), reprinted in 29 U.S.C.A. §794 app. (Supp. 1980), required HEW to promulgate guidelines for the government-wide enforcement of section 504. The regulations HEW issued pursuant to that Order, 45 C.F.R. §85.5 (1979), mandated all federal agencies to adopt Title VI enforcement procedures in establishing their respective mechanisms for enforcing section 504. In the course of amending the Rehabilitation Act in 1978, Congress subsequently endorsed HEW's adoption of the Title VI procedures for purposes of implementing section 504, see S. Rep. No. 95-890, 95th Cong., 2d Sess. 18 (1978) (explaining amendment adding section 505(a)(2) to the Act, discussed infra at p. 11). The Department of Justice duly incorporated the Title VI procedures in its own regulations implementing section 504, 28 C.F.R. §42.530, 45 Fed.Reg. 37626 (Dec. 3, 1980); it has now been given responsibility for coordinating government-wide enforcement of section 504 — as well as Title VI and Title IX — under Executive Order 12250, 45 Fed. Reg. 72995 (Nov. 4, 1980).

of discrimination. An agency found to have discriminated will be cut off from funding, but the individual victim of discrimination will benefit not at all. Indeed, the individual complainant is not even granted a role in the agency investigation and enforcement proceedings. A private remedy which focuses on the aggrieved individual and permits a court to provide individually tailored relief is therefore a far more appropriate and effective remedy, as the circumstances of the case at bar make absolutely clear.

The United States Department of Justice, the agency which is now responsible for coordinating all federal administrative efforts to enforce section 504,[11/] endorses private rights of action under section 504:

> The Department has adopted the Title VI complaint and enforcement procedures for use in implementing section 504. . . .
>
> As to remedies, section 120(a) of the Rehabilitation Act Amendments of 1978 authorizes the payment of attorneys' fees to the prevailing party "in any action or proceeding to enforce or charge a violation of this title" (Title V). Accordingly, it is clear that there is a private right of action under section 504. "The availability of attorneys' fees should assist in vindicating private rights of action . . . arising under section 504." Sen. Rep. No. 95-890, 95th Cong., 2d Sess. (1978). Cf., Cannon v. University of Chicago, 441 U.S. 677 (1979).

11/ See n. 10, supra.

28 C.F.R. Part 42, App. B, 45 Fed. Reg. 37631-2 (June 3, 1980). In fact, far from viewing private lawsuits as a threat to the consistent enforcement of section 504, the Department of Justice does not require exhaustion of its administrative remedies before such suits are filed:

> Nothing in this subpart requires the referral of a complaint against a recipient to the Department for action as a legal prerequisite for filing a lawsuit against the recipient.

Id. As this Court has said many times, the judgment of the agency charged with enforcement of this statute is entitled to respect:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' " Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396 [1961].

Udall v. Tallman, 380 U.S. 1, 16 (1965); EPA v. National Crushed Stone Association, 49 U.S.L.W. 4008, 4013 (Dec. 2, 1980).

Unquestionably, then, recognition of both private and public enforcement mechanisms will enhance the realization of Congress' objectives in enacting section 504.

C. The Fourth Cort v. Ash Factor: Implying a Federal Remedy is Clearly Appropriate.

Finally, there can be no question after Cannon that the fourth inquiry under Cort mandates recognition of a private right of action with respect to section 504. As in Cannon, this case involves a civil rights statute prohibiting invidious discrimination by those who are recipients of federal funds. As to all such statutes, Cannon provides the definitive answer to the last Cort inquiry:

> Fourth, the final inquiry suggested by Cort is whether implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the States. No such problem is raised by a prohibition against invidious discrimination of any sort, including that on the basis of sex. Since the Civil War, the Federal Government and the federal courts have been the "'primary and powerful reliances'" in protecting citizens against such discrimination. Steffel v. Thompson, 415 U.S. 452, 464, 94 S.Ct. 1209, 1218, 39 L.Ed.2d 505 (emphasis in original), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928). Moreover, it is the expenditure of federal funds that provides the justification for this particular statutory prohibition. There can be no question but that this aspect of the Cort analysis supports the implication of a private federal remedy.

Cannon, supra, 99 S.Ct. at 1963.

* * *

In sum, implication of a private right of action is clearly appropriate in this case. Indeed, the courts of appeals for all seven circuits which have reached this issue to date have recognized Congress' clear intent to create a private remedy for victims of discriminatory practices forbidden by section 504, and have respected that intent by finding a private right of action to be implicit in section 504. Kling v. Los Angeles County (9th Cir., Dec. 8, 1980), 49 U.S.L.W. 2414 (Dec. 23, 1980); Carmi v. Metropolitan St. Lewis Sewer District, 620 F.2d 672 (8th Cir. 1980), cert. denied, 101 S.Ct. 249 (1980); Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247, 1258 (3rd Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296, 299 (2d Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1281 (7th Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413, 415 (8th Cir. 1977). [12/]

12/ Even those courts of appeals which have narrowly defined handicapped individuals' standing to bring actions challenging employment discrimination in violation of

(footnote continued next page)

II

SINCE THE UNIVERSITY OF TEXAS AT AUSTIN WAS THE "PROGRAM OR ACTIVITY" THAT DISCRIMINATED AGAINST RESPONDENT, THE COURT OF APPEALS CORRECTLY GRANTED RESPONDENT RELIEF.

Petitioners stipulated below that federal financial assistance provided a substantial portion of the operating budget of the University at the time it denied respondent Camenisch the assistance he sought. Petitioners also stipulated that respondent Camenisch was a "qualified handicapped individual" who "need[ed] the services of a qualified interpreter in order to effectively participate in the educational program operated by [the University]" (Stipulation of Facts, ¶ ¶ 8, 10, Petitioners' Appendix at A-30, 31).

For the first time, in this Court, petitioners seek to raise the question whether the federal funds received

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section 504, as discussed infra at n. 18, have not doubted the existence of a private right of action generally under section 504, see Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672 (8th Cir. 1980) cert. denied, 101 S.Ct. 249 (1980); Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980); Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

by the University were directly related to the program in which respondent sought to participate. Petitioners argue that, in the absence of evidence of a direct relationship between the federal financial assistance the University received and its act of discrimination against respondent Camenisch, the courts below should have denied respondent relief. Petitioners' argument should be rejected for two reasons.

First, petitioners' argument is based upon an incorrect reading of the phrase "program or activity" as used in section 504. Petitioners' reading is contrary to the purposes behind section 504 and to the controlling regulations promulgated by the Department of Justice -- the agency now responsible for coordinating government-wide enforcement of section 504 — and by the Department of Health, Education and Welfare — the agency which provided the University of Texas at Austin with federal financial assistance.

Second, because petitioners never raised this issue below, this Court has no factual background upon which to decide whether, in this case, should it reject the definition of "program or activity" mandated by executive department regulations, respondent was "subjected to discrimination under any program or activity receiving federal financial assistance."

A. The Operations of Petitioner University of Texas at Austin as a Whole Constitute a "Program or Activity" Receiving Federal Financial Assistance.

The broad nondiscrimination mandate and legislative history of section 504 of the Rehabilitation Act, as well as authoritative interpretations by the federal agencies with responsibility for coordinating enforcement of section 504 among recipients of federal financial assistance, make clear that the proper definition of "program or activity" reaches the University of Texas at Austin as a whole.

In enacting its ban against handicap-based discrimination "under any program or activity receiving Federal financial assistance" in section 504, Congress did not explicitly define the term "program or activity." Nonetheless Congressional intent to reach and redress discrimination against qualified handicapped individuals in all activities receiving or benefitting from federal funds is clearly demonstrated by the broad remedial purposes of the Rehabilitation Act[13/] and by the interrelated package of affirmative action and nondiscrimination mandates that is contained in Title V of the Act,

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13/ Congress' declaration of purpose when the Rehabilitation Act was originally enacted in 1973 spelled out in detail its goals of expanding services to the handicapped, of promoting vocational rehabilitation efforts

(footnote continued next page)

including section 504.[14/] The legislative history of the Act and its subsequent amendments also displays a clear Congressional intent to address discrimination under any

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by, inter alia, training vocational rehabilitation personnel, and of expanding employment opportunities to the handicapped in both public and private sectors, Pub. L. 93-112, §2, 87 Stat. 357, reprinted in 29 U.S.C.A. §701. In the 1978 Amendments to the Act, Congress made its declaration of policy more concise, see H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 41, reprinted in [1978] U.S. Code Cong. & Ad. News 7375, 7412-13, and expressed a comprehensive goal of guaranteeing equal opportunity to the handicapped not merely in employment (as the original provision had suggested) but generally:

> The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living. 29 U.S.C. §701.

[14/] In addition to section 504, whose nondiscrimination mandate bars discrimination in federal agencies as well as among all recipients of federal financial assistance in the provision of benefits, services and employment, section 501 requires federal government agencies to take affirmative action to employ and promote the handicapped, 29 U.S.C. §791, and section 503 requires federal contractors and subcontractors to do the same, 29 U.S.C. §793.

and all federal grants, and nowhere suggests that Congress intended the narrow reading of "program or activity" petitioners would impose.[15/]

Consistent with this Congressional intent, the United States Department of Health, Education and Welfare and the Department of Justice — the agencies charged with coordinating government-wide implementation and enforcement of Section 504 since its enactment in 1973 — have issued regulations on section 504 which make it clear that the operations of the University of Texas at Austin as a whole, not merely those parts of it that received dollars directly from the massive infusion of federal aid to that institution, constitute the "program or activity" which violated section 504 by denying respondent the interpreter funds he sought.

The Department of Justice regulations are explicit on this issue:

15/ See e.g., S. Rep. No. 93-318, 93d Cong. lst Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2078, 2091, 2123, 2143; S.Rep. No. 93-1297, 2d Sess. 38-39, reprinted in [1974] U.S. Code Cong. & Ad. News 6371, 6389 (explaining that Congress had broadened the definition of "handicapped individual" for purposes of Title V of the Act because the narrowness of its prior definition had failed to protect, among others, children denied admission to "Federally-supported school systems" and persons who had completed vocational rehabilitation but were still discriminated against in "Federally-assisted activities").

> The term "program" means the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal assistance awarded, e.g., a police department or department of corrections.

28 C.F.R. §42.540(h), 45 Fed. Reg. 37626 (June 3, 1980) (emphasis added). Under this definition, all the operations of an institution which receives federal funding are clearly subject to the nondiscrimination mandate of section 504.

The HEW regulations, relevant here because it is HEW which supplied funding to the University,[16/] support this broad reading of "program or activity." Thus, while the HEW regulations do not define "program or activity," the definition of "recipients" of federal financial assistance who are subject to section 504 is instructive:

> (f) "Recipient" means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

16/ The HEW regulations are also relevant because HEW was originally designated as the agency responsible for coordinating the enforcement of section 504 by all federal agencies. See n. 10, infra.

45 C.F.R. §84.3(f) (1979); 45 C.F.R. §85.3(d) (1979).[17/] The HEW regulations that specifically govern post-secondary educational institutions such as the University of Texas at Austin are to the same effect. The regulations prohibiting discriminatory practices by such institutions in violation of section 504 are made applicable to:

> postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

17/ See also HEW's general definition of prohibited discriminatory practices under section 504:

> A recipient, in providing any aid, benefit or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
>
> (i) Deny a qualified handicapped individual the opportunity to participate in the aid, benefit or service; . . .
>
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization or person that discriminates on the basis of handicap in providing any aid, benefit or service to beneficiaries of the recipients' program.

45 C.F.R. §84.4(b)(1)(i), (v) (1979); 45 C.F.R. §85.51(b)(1)(i), (v) (1979) (emphasis added).

45 C.F.R. §84.41 (1979) (emphasis added). See also 45 C.F.R. §§ 84.42-84.47 (1979).

These authoritative administrative interpretations of the scope of the phrase "program or activity" and the reach of section 504 compel the conclusion that the court below was correct in granting respondent relief on the strength of petitioner's stipulation that it received a substantial amount of federal financial assistance. See also NAACP v. Medical Center, supra, 599 F.2d at 1248 n. 4 (3rd Cir. 1979); Kampmeier v. Nyquist, supra, 553 F.2d at 298 n. 2 (2d Cir. 1977); Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979); Whitaker v. Board of Higher Education of the City of New York, 461 F.Supp. 99 (E.D.N.Y. 1978); Crawford v. University of N. Carolina, 440 F.Supp. 1047 (M.D. N.C. 1977); Barnes v. Converse College, 436 F.Supp. 635 (D.C.S.C. 1977); Sites v. McKenzie, 423 F.Supp. 1190 (N.D. W.Va. 1976).[18/]

18/ Petitioners' argument to the contrary is based upon decisions, cited infra at n. 12, which concern the scope of section 504 in cases involving, not the services sought by respondent here, but discrimination in employment by recipients of federal funds. That discrete issue, about which there is considerable dispute, see e.g., Hart v. County of Alameda, 485 F.Supp. 66 (N.D. Cal. 1979), 28 C.F.R. Part 42, App. B(B) (Analysis of Justice Department regulations on section 504), 45 Fed. Reg. 37628 (June 3, 1980), is simply irrelevant in the circumstances of this case.

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Petitioners have not offered any sound reason to overturn these executive and judicial interpretations of the scope of section 504. Indeed, petitioners' narrow reading would severely emasculate the protections offered by section 504. It would permit, for example, a recalcitrant recipient of federal financial assistance to escape civil rights scrutiny — not only by the courts but also by the executive agency funding sources — by allocating federal support to discrete operations. Such a

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Petitioners' reliance on misplaced analogies to Title VI of the Civil Rights Act and Title IX of the Educational Amendments of 1972 in support of their mean definition of what "programs" are subject to the nondiscrimination mandate of section 504 is equally off the point, as there are substantive differences in the coverage of those laws and section 504 of the Rehabilitation Act. The "program-specificity" requirements of Title VI, see, e.g., Board of Public Instruction of Taylor County v. Finch, 414 F.2d 1068 (5th Cir. 1969) stems from and is directly based on the statutory "pinpoint" requirement of section 602 of the Civil Rights Act of 1964, 42 U.S.C. §2000d-1, which has no analogue in the nondiscrimination provisions of Title V of the Rehabilitation Act. The Title IX cases cited by petitioner (Petitioner's Brief at 18) all concern the question whether that law's prohibition against sex discrimination in educational institutions extends to protect employees of such institutions. That issue, about which there is disagreement, see, e.g., North Haven Board of Education v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), has no bearing on the case at bar, since Congress' intentions regarding the coverage of employees of federal fund recipients differ under section 504 and Title IX.

reading would make the coverage of section 504 contingent upon creative bookkeeping practices which would undermine the effectiveness the Congress clearly meant it to have.

B. Any Restricted Reading of the Phrase "Program or Activity" Should Not Be Made on The Scanty Factual Record Developed in this Case.

Beyond the bare stipulation that petitioner University receives substantial federal support, no facts were developed by the parties and courts below about how the federal funds received by the University were budgeted among its divisions, departments, courses, or functions. In part this is because petitioners did not raise the "program or activity" issue in the courts below. As a consequence, this Court has no factual record upon which to determine the proper definition of the term "program or activity" should it decide to reject the definition promulgated by the executive agencies responsible for section 504 enforcement.

A fully developed factual record is essential to such an inquiry. First, respondent Camenisch claims in this Court that he will be able to show that the University of Texas Graduate School of Education, in which he was enrolled, received funds under a federal aid program designed to pay the costs of training "personnel

engaged or preparing to engage in employment as teachers of handicapped children [or] as supervisors of such teachers. . . ." (20 U.S.C. §1431). If respondent Camenisch makes such a showing, no further inquiry need be made since there would be a clear, direct connection between the federal financial assistance received by the University of Texas and its act of discrimination against respondent.

Moreover, between the clear answer provided by such a showing by respondent and the clear mandates of the federal regulations, there are innumerable possible rulings this Court could make on the scope of the phrase "program or activity." It is because of the complexity of the issue and the wide-ranging effect a ruling by this Court would have that a fully developed factual record is essential. Therefore, should this Court decide to reject the federal agencies' and lower courts' interpretation of the scope of section 504, this case should be remanded for further proceedings relevant to this issue.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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